

## Message Text

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ORIGIN EB-08

INFO OCT-01 EUR-12 ISO-00 CAB-02 CIAE-00 COME-00  
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NSC-05 SP-02 SS-15 H-01 IO-13 OES-06 EPA-01  
TRSE-00 PA-01 PRS-01 USIE-00 SSO-00 NSCE-00  
INRE-00 ARA-06 /088 R

DRAFTED BY EB/TCA:SPIPER  
APPROVED BY EB/TCA/OA:MHSTYLES  
EUR/NE:NACHILLES  
EUR/WE:JDOBBINS

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O 212120Z APR 77  
FM SECSTATE WASHDC  
TO AMEMBASSY LONDON IMMEDIATE  
AMEMBASSY PARIS IMMEDIATE

C O N F I D E N T I A L STATE 090254

E.O. 11652: GDS

TAGS: EAIR, UK, FR

SUBJECT: CONCORDE

FOLLOWING FOR INFORMATION IS TEXT OF USDEL RESPONSE TO  
UKDEL APRIL 7 STATEMENT ON CONCORDE (RELAYED IN STATE 78859).  
STATEMENT HAS STATE AND TRANSPORTATION CLEARANCE.

1. "AS YOU HAVE CLEARLY POINTED OUT, IN THE CONTEXT OF THE  
NEW YORK LITIGATION WE HAVE REFRAINED FROM DISPUTING THE  
LEGAL POSITION YOU HAVE ASSERTED -- NOT BECAUSE WE AGREE  
WITH THAT POS,TION, BUT RATHER BECAUSE WE FELT IT WAS IN  
THE BEST INTEREST OF OUR FOREIGN RELATIONS TO AVOID FOCUS-  
ING ATTENTION ON OUR CONTRARY INTERPRETATION OF THE OBLI-  
GATIONS OF THE U.S. UNDER THE AGREEMENT. YOUR SHARP CHAL-  
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LENGE TO OUR RETICENCE DELIVERED AS U.K. RENEGOTIATION  
NUMBER 32, LEADS US TO ELABORATE TO YOU DIRECTLY OUR VIEWS  
ON THE ISSUE, VIEWS WHICH WE HAVE OUTLINED IN THE COURSE  
OF MEETINGS BETWEEN THE STATE DEPARTMENT'S LEGAL ADVISER  
AND COUNSEL FOR THE U.K. GOVERNMENT AND BRITISH AIRWAYS.  
WE WILL STATE THOSE VIEWS AS SIMPLY AND SUCCINCTLY AS POS-  
SIBLE.

2. "ARTICLE 2 OF THE BERMUDA AGREEMENT PROVIDES THAT AN AIR  
CARRIER OF ONE PARTY WHICH HAS BEEN PROPERLY DESIGNATED AND

WHICH HAS RECEIVED APPROPRIATE OPERATING PERMISSION FROM THE OTHER PARTY 1/ (FOOTNOTE 1 - THE U.K. ASSUMES THAT THE DECISION OF FORMER SECRETARY OF TRANSPORTATION, THE HONORABLE WILLIAM T. COLEMAN, JR., AMOUNTS TO AN UN-CONDITIONAL GRANT OF THE "APPROPRIATE OPERATING PERMISSION" NECESSARY FOR THE COMMENCEMENT OF CONCORDE SERVICES. HOWEVER, THE COLEMAN DECISION (FOOTNOTE 6, P. 3) CLEARLY RECOGNIZED WITH RESPECT TO JFK AIRPORT THAT "UNDER FEDERAL POLICY THAT HAS HITHERTO PREVAILED A LOCAL AIRPORT PROPRIETOR HAS HAD AUTHORITY UNDER CERTAIN CIRCUMSTANCES TO REFUSE LANDING RIGHTS." END FOOTNOTE) MAY INAUGURATE THE AGREED SERVICES IMMEDIATELY, ON THE CONDITION THAT IT "MAY BE REQUIRED TO SATISFY THE AERONAUTICAL AUTHORITIES" OF THE OTHER PARTY THAT IT IS "QUALIFIED TO FULFILL THE CONDITIONS PRESCRIBED BY OR UNDER THE LAWS AND REGULATIONS NORMALLY APPLIED BY THOSE AUTHORITIES TO THE OPERATIONS OF COMMERCIAL AIR CARRIERS." THE U.K. HAS TAKEN THE VIEW THAT ARTICLE 2 REPRESENTS AN EXCLUSIVE CATALOGUE OF THE CONDITIONS WHICH MAY BE IMPOSED ON AN AIR CARRIER SEEKING TO OPERATE THE AGREED SERVICES, AND THAT ONCE THOSE CONDITIONS ARE SATISFIED THE CARRIER MAY COMMENCE OPERATIONS IMMEDIATELY.

3. "THE U.S. DOES NOT SUBSCRIBE TO THIS INTERPRETATION OF ARTICLE 2. IN OUR VIEW THAT ARTICLE, AND INDEED ALL THE CONFIDENTIAL

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PROVISIONS IN THE BERMUDA AGREEMENT CONFERRING RIGHTS, ARE SUBJECT TO THE GENERAL RULE OF ARTICLE 5 THAT THE LAWS AND REGULATIONS OF ONE PARTY RELATING TO ENTRY INTO, DEPARTURE FROM, OR NAVIGATION WITHIN THE TERRITORY OF THAT PARTY SHALL APPLY TO AIRCRAFT OF THE DESIGNATED CARRIER OF THE OTHER PARTY. THUS ARTICLE 2 MAY BE READ TO AUTHORIZE THE IMMEDIATE INAUGURATION OF AN AGREED SERVICE ONLY IF THE AIRCRAFT CONDUCTING THE SERVICE COMPLIES UNDER ARTICLE 5 WITH "(T)HE LAWS AND REGULATIONS" OF THE CONTRACTING PARTY "RELATING TO ENTRY INTO OR DEPARTURE FROM ITS TERRITORY" AND "THE OPERATION AND NAVIGATION OF...AIRCRAFT WHILE WITHIN" THE TERRITORY OF THAT CONTRACTING PARTY.

4. "THE U.K. CONCEDES IN ITS RENEG 32 THAT FOR THE PURPOSES OF ARTICLE 5 THE SCOPE OF PERMISSIBLE "LAWS AND REGULATIONS" IS NOT LIMITED TO FEDERAL CONTROL OF INTERNATIONAL AVIATION, BUT INCLUDES SOME MEASURE OF STATE AND LOCAL LEGISLATION AND REGULATION AS WELL. YOU ARE AWARE THAT OUR CONSTITUTIONAL SCHEME CLOSELY CIRCUMSCRIBES STATE AND LOCAL AUTHORITY TO INTERFERE WITH FOREIGN COMMERCE, OF WHICH INTERNATIONAL AVIATION IS CERTAINLY AN INTEGRAL PARTY. YOU SHOULD ALSO BE AWARE THAT INsofar AS EXISTING COURT DECISIONS AND LEGISLATION ADDRESS THIS ISSUE, THEY ESTABLISH

THAT IN THE ABSENCE OF EXPLICIT FEDERAL PREEMPTION OF ALL CONTROL OVER AVIATION, THERE REMAINS SOME LOCAL AUTHORITY TO REGULATE ASPECTS OF AIR SERVICES IN ORDER TO CONTROL THEIR IMPACT ON PARTICULAR ENVIRONMENTS AND LOCALITIES. UNDER EXISTING LAWS AND COURT DECISIONS, AIRPORT PROPRIETORS MAY REGULATE TO PREVENT CERTAIN EFFECTS OF AIRCRAFT NOISE IN WAYS THAT DO NOT INTERFERE WITH FEDERAL SAFETY AND AIR NAVIGATION RESPONSIBILITIES, THAT DO NOT UNJUSTLY DISCRIMINATE BETWEEN DIFFERENT CATEGORIES OF AIRPORT USERS, AND THAT DO NOT IMPOSE AN UNDUE BURDEN ON INTERSTATE OR FOREIGN COMMERCE. THUS, WE NOTE THAT THE ISSUE, ALLEGED BY THE U.K. TO BE A BREACH OF A BILATERAL COMMITMENT, IN  
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FACT RESOLVES INTO A MATTER OF U.S. DOMESTIC LAW: IS THE PORT AUTHORITY'S BAN ON LANDINGS BY SUPERSONIC AIRCRAFT A TYPE OF REGULATION OF AIRCRAFT NOISE PERMITTED TO AIRPORT PROPRIETORS, OR ALTERNATIVELY, IS IT AN IMPERMISSIBLE AND UNCONSTITUTIONAL RESTRICTION, EITHER BECAUSE IT INVADES A FEDERAL SCHEME OF CONTROL OVER AVIATION NOISE IN A MANNER INCONSISTENT WITH THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION, OR BECAUSE IT CONSTITUTES AN UNDUE BURDEN ON FOREIGN OR DOMESTIC COMMERCE? IN THE INSTANT CASE, THE U.S. GOVERNMENT HAS NOT PREEMPTED THE AUTHORITY OF LOCAL AIRPORT PROPRIETORS TO ESTABLISH APPROPRIATE AIRCRAFT NOISE CONTROL REGULATIONS. THEREFORE, WE HAVE NOT TAKEN A POSITION ON THE DOMESTIC LEGAL ISSUES IN THE NEW YORK LITIGATION. UNDER THE CIRCUMSTANCES, THE U.S. POSITION WOULD NOT COINCIDE WITH THAT ADVANCED BY BRITISH AIRWAYS IN THAT CASE.

5. "U.K. RENEG 32 DOES NOT ADDRESS THIS POINT, BUT INSTEAD STATES THAT THE EXERCISE OF SUCH LOCAL REGULATORY AUTHORITY, WHETHER PROPER UNDER U.S. LAW OR NOT, REPRESENTS AN ENCUMBRANCE ON AND POSSIBLY EVEN A DENIAL OF A ROUTE RIGHT GRANTED TO THE U.K. UNDER THE BERMUDA AGREEMENT. WE RESPECTFULLY DISAGREE WITH THIS CONTENTION. THE PROVISION CONFERRING THE RIGHT TO CONDUCT AIR SERVICES BETWEEN NEW YORK AND LONDON EXCHANGED BY THE U.S. AND THE U.K. IN THE BERMUDA AGREEMENT DOES NOT CONTAIN ANY REFERENCE TO THE USE OF PARTICULAR TYPES OF EQUIPMENT SUCH AS SUPERSONIC AIRCRAFT. INSTEAD THE ROUTE RIGHT IMPLIES A CONCOMITANT RIGHT TO USE ANY TYPE OF EQUIPMENT PERMISSIBLE UNDER THE OTHER PROVISIONS OF THE BERMUDA AGREEMENT. TO BE ACCEPTABLE FOR SERVICE INTO THE U.S. UNDER THE BERMUDA AGREEMENT, AN AIRCRAFT MUST NOT ONLY COMPLY WITH FAA REGULATIONS CONCERNING MATTERS SUCH AS OPERATING SPECIFICATIONS--IT MUST ALSO BE CAPABLE OF SATISFYING THE REQUIREMENTS OF LAWS AND REGULATIONS GOVERNING THE NAVIGATION OF AIRCRAFT PERMITTED UNDER ARTICLE 5. FOR ONE PARTY TO DENY THE OTHER  
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THE RIGHT TO USE AN AIRCRAFT WHICH IS UNABLE TO COMPLY WITH ITS DOMESTIC LAWS AND REGULATIONS IS NOT TO REORDER THE BARGAIN INVOLVED IN AN EXCHANGE OF ROUTE RIGHTS: THE RIGHT TO USE ON THE AGREED ROUTES ANY EQUIPMENT WHICH CAN BE EMPLOYED CONSISTENTLY WITH THE PROVISIONS OF THE AGREEMENT REMAINS INVIOLE. A PARTY WHICH INSISTS UPON THE RIGHT TO INTRODUCE INTO THE AGREED SERVICES AN AIRCRAFT INCAPABLE OF COMPLYING WITH APPLICABLE DOMESTIC LAWS AND REGULATIONS HARBORS AN UNREASONABLE EXPECTATION.

6. "U.K. RENEG 32 CITES THE VIENNA CONVENTION ON THE LAW OF TREATIES FOR THE PROPOSITION THAT A "PARTY TO A TREATY MAY NOT INVOKE THE PROVISIONS OF ITS DOMESTIC LAW FOR ITS FAILURE TO PERFORM THAT TREATY." THIS PRINCIPLE IS APPLICABLE TO INTERNATIONAL AGREEMENTS CONCLUDED BY THE U.S. AS EXECUTIVE AGREEMENTS, AND IN THIS INSTANCE WE HAVE COMPLIED WITH IT. WE DO NOT INVOKE THE PORT AUTHORITY'S REGULATION TO EXCUSE A BREACH OF A SUPPOSED ABSOLUTE COMMITMENT TO ACCEPT ANY AIRCRAFT CERTIFIED AIRWORTHY BY THE U.K.; INSTEAD, WE POINT OUT THAT OUR COMMITMENT TO ACCEPT AN AIRCRAFT IS GIVEN SUBJECT TO THE CONDITION THAT IT SATISFY DOMESTIC LAWS AND REGULATIONS SUCH AS THAT IMPOSED BY THE PORT AUTHORITY. BECAUSE WE ARE OBVIOUSLY UNABLE TO IGNORE THE EXISTENCE OF NON-FEDERAL REGULATORY POWERS WITHIN THE U.S., OUR GRANT OF RIGHTS IS NECESSARILY SUBJECT TO THE LIMITATION IMPLIED BY ARTICLE 5.

7. " THIS STATEMENT OF OUR LEGAL VIEWS ON THE CONTROVERSY SURROUNDING CONCORDE ACCESS TO JFK SHOULD NOT OBSCURE OUR GENUINE REGRET OVER THE DIFFICULTIES YOU HAVE ENCOUNTERED; WE DO NOT FAIL TO PERCEIVE THE IMPORTANCE BRITISH AIRWAYS AND THE U.K. GOVERNMENT ATTACH TO THIS MATTER. NOR SHOULD OUR STATEMENT BE READ TO SANCTION THE IMPOSITION OF A BAN WHICH DISCRIMINATES AGAINST CONCORDE OR ANY OTHER AIRCRAFT: THE BERMUDA AGREEMENT AND THE CHICAGO CONVENTION EXPLICITLY CONFIDENTIAL

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FORBID DISCRIMINATORY REGULATION.

8. "THE U.S., HOWEVER, DOES NOT STAND IN DEFAULT OF ANY OBLIGATION UNDER THE BERMUDA AGREEMENT.

9. "THE QUESTION WHETHER CONCORDE CAN IN FACT COMPLY WITH THE EXISTING PORT AUTHORITY NOISE RESTRICTIONS, AND WHETHER THESE RESTRICTIONS ARE LAWFUL UNDER U.S. DOMESTIC LAW, ARE CURRENTLY BEING ADJUDICATED. THE FAA HAS PROVIDED TO BRITISH AIRCRAFT CORPORATION ITS COMMENTS ON THE NOISE DATA WHICH WERE RECENTLY PROVIDED TO THE PORT AUTHORITY. LIKE YOU, WE EAGERLY AWAIT THE SPEEDY RESOLUTION OF THESE ISSUES BY THE APPROPRIATE AUTHORITIES IN NEW YORK."

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## Message Attributes

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**Review Markings:**  
Margaret P. Grafeld  
Declassified/Released  
US Department of State  
EO Systematic Review  
22 May 2009  
**Markings:** Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009